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No. 85-759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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ARGUMENT

THE POLICE ASSUMPTION THAT THERE WAS ONE APARTMENT ON THE THIRD FLOOR WAS REASONABLE. THUS, THERE WAS NO VIOLATION OF THE FOURTH AMENDMENT AND NO NEED TO APPLY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHICH WOULD BE BASED ON AN IDENTICAL INQUIRY.

Respondent's argument, like the Court of Appeals opinion it seeks to defend, does not address the issue of reasonableness that is at the core of this case.

We do not seek "a radical new exception to the warrant requirement which would condone warrantless searches whenever a police officer believes he has the right to conduct a warrantless search." (Brief for Respondent at 5). Nor can this case be "readily resolved", as the Court of Appeals believed, merely by condemning the search of Garrison's apartment with the incantation that the police had no warrant to search it. (APC 36). The question is whether the police search of Garrison's bedroom in the mistaken

belief that it was part of McWebb's apartment was reasonable. Just as in Hill v. California, 401 U.S. 797 (1971), the heart of the matter is not whether the police acted mistakenly, but whether they acted reasonably. Reasonableness is what this case is all about.

Police, armed with a warrant to search both Lawrence McWebb and the premises "2036 Park Avenue, third floor apartment", entered the only door on the third floor at that address and commenced to search the premises. In fact, the third floor of 2036 Park Avenue accommodated two apartments, McWebb's and Respondent Garrison's. The trial court found that the police did not realize that the third floor contained two apartments until after the search was nearly over and they had recovered the incriminating evidence from Garrison's bedroom.

In order to analyze whether it was reasonable for the police to assume that the third floor contained only one apartment, it is helpful to consider their

conduct in three stages, each of which presented them with additional information, impressions and opportunities for judgment: (a) the period of investigation during which the warrant was sought and obtained; (b) the arrival at 2036 Park Avenue and the ascent to the third floor; and (c) the entry and search itself.

a. Investigation

Detective Marcus, an experienced narcotics detective, received information from a reliable, confidential informant that a person named "Red Cross" was selling marijuana "out of his apartment located at 2036 Park Avenue, third floor". (J.A. 6). According to the informant, he/she made frequent purchases from "Red Cross" over a period of six months, including a buy within hours of Marcus' execution of his affidavit for a search warrant. In each of the transactions the informant "rang the front bell", which was answered by "Red Cross" who invited the informant "up into his third floor apartment" (J.A. 6). The informant described 2036 Park Avenue as a

three story brick dwelling. He/she said nothing to indicate that there was more than one apartment on the third floor.

After personally corroborating the informant's description of the outside of 2036 Park Avenue, Marcus called the local utility, Baltimore Gas and Electric Company (B.G.& E.), "to find out who the third floor was listed to ...." (J.A. 37) and "discovered that the premises of 2036 Park Avenue, third floor, was in the name of Lawrence McWebb" (J.A. 7). Marcus testified as follows:

> "A. ... When I called the gas and electric and I ascertained an apartment, I asked if there is a front or rear or middle room. They told me, one third floor was only listed to Lawrence McWebb." (J.A. 36)

> "A. ... When I asked for the third floor apartment, I said, is anybody listed in either front or rear? They tell you if it is listed because they have it broken down that way." (J.A. 38)

A check of police records produced McWebb's arrest record and a photograph of McWebb, which was identified by the informant as "Red Cross". Marcus

prepared his affidavit and successfully sought the warrant.

We know now that the information received from B.G.& E. was mistaken and that there were two apartments on the third floor for which McWebb and Garrison were billed separately. But B.G.& E.'s mistake was not Marcus', nor is its negligence attributable to him. Marcus acted reasonably. He went to the one source most likely to know best how many apartments there were. He expressly asked if the floor was subdivided and he relied on B.G.& E.'s response.

It is true that Marcus could have done more. He could have checked with the building manager or owner. To do so, however, would have increased the likelihood that, intentionally or not, McWebb might have been alerted and evidence destroyed. He could have attempted to arrange a controlled buy or closer surveillance, but, as Marcus' affidavit points out, the location of the apartment on the third floor made

monitoring without detection nearly impossible (J.A. 7). He could have checked with the fire department or the phone company, but he had no reason to question information he had already received from a public utility. He could have questioned his informant more closely, but, in view of the B.G.& E. response, he had no need to inquire further.[1]

Marcus could have done all these things. But he simply had no reason to doubt the information he had received or to question the assumption on which he was acting. To insist that he should have done more distorts the Fourth Amendment's rule of reason.

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[1] Police routinely rely on information supplied by utilities, government agencies, and other institutional sources, e.g., United States v. Napoli, 530 F.2d 1198, 1200 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976) (telephone and city directories); Ballew v. United States, 389 F.Supp. 47, 57 (D. Md. 1975) (Maryland Motor Vehicle Administration). Unfortunately, these normally reliable sources can make mistakes, People v. Superior Court, County of Mono, 161 Cal.Rptr. 540, 551 (Cal.App. 1980) (misinformation by telephone company).

Police reliance on what the Court of Special Appeals called B.G.& E.'s "verification" was a crucial element in the trial court's finding that the search was reasonable and in the Court of Special Appeals' conclusions that the police "reasonably concluded that McWebb occupied the entire third floor" and "had no reason to believe that the third floor contained more than one apartment" (APC 13, 18).

b. Arrival

Events during the few minutes between arrival of the raiding party at 2036 Park Avenue and the search reinforced police assumptions that McWebb resided in the only apartment on the third floor.

Officer Shea, the first officer on the scene, attempted to gain access to the building without breaking down the front door. He wore a construction worker's hard hat as a ruse and rang all seven bells but got no response. Nothing in his observation of the bells or the mail slots warned Shea that the warrant was inaccurate. He saw no apartment numbers on the

mail slots or bells. He saw names but "definitely" (M2. 9) not the name McWebb. The fact that a three story building with a basement appeared to contain seven apartments did not contradict the information on which the warrant was based. As the Court of Special Appeals said, "any combination of units is possible". It called the idea that the number of apartments put police on notice that there were two apartments on the third floor "pure speculation" (APC 18).

Even assuming, however, that some basis may have existed for speculation or conjecture on Shea's part, it dissipated with the sudden arrival of McWebb. McWebb pulled up in a car moments after the police arrived and was immediately informed of the warrant and detained.[2] He furnished the key that opened the outside door and, after the raiding party of six or seven arrived on the third floor, the key to the door at

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[2] McWebb was legitimately detained because the warrant authorized a search of his person and under the rationale of Michigan v. Summers, 452 U.S. 692 (1981).

the top of the stairs. (M. 17) With McWebb now on the scene, there was no reason whatsoever to scrutinize doorbells, search out the resident manager or count apartments on each floor as the police climbed the stairs. The police had the most solid and reliable information available - the target of the investigation and anticipated search was going to let them into his apartment.

Nor did anything about the ascent itself cast doubt on the police premise that McWebb's apartment, and only McWebb's apartment, was at the top of the stairs. On the contrary, Detective Marcus noticed that there was only one door on the third floor but there were "a lot of doors" (M2. 61-62) on the other floors. Officer Shea also underscored the significance of the single third floor door:

> "Q: [on cross-examination] ... Did it occur to you that there may have been two apartments on the third floor?
>
> A: No. When I saw that one door, no, sir." (M2. 17)

The police had every reason to believe that McWebb was admitting them to the only apartment on the third floor, his own. They had no basis whatever to believe that he was admitting them to someone else's apartment. Under these circumstances it was not only reasonable to believe that the warrant's assumption of a single apartment was correct; it would have been quite unreasonable to believe otherwise.

c. Entry and Search

The few seconds following the officers' entry of the premises are especially critical in assessing the reasonableness of their conduct. They are crucial because Officer Marcus began searching Garrison's bedroom only moments after the entry. If the scene they came upon when they entered should have given them reason to believe that there were two apartments on the floor, then they should have reassessed their conduct regardless of either its reasonableness to that point or the presence of marijuana in plain view

on Garrison's dresser. Analytically, these few seconds are the consititutional point of no return.

But everything the police saw and heard in those first few moments strengthened their belief that they were in McWebb's apartment.

The front door admitted them to a tiny 4-5 feet wide foyer that opened onto a living room on the left and a bedroom on the right. The doors of those rooms opened inward and were fully open at the time. (J.A. 19-21, M2. 19) No closed doors, much less locked ones, were visible, as might have been expected if two apartments were involved. As the trial court found, "no door was visible at the time the police entered" (J.A. 43). Nothing about wide open access between a bedroom and a living room should have alerted the police to the sort of duplicate living arrangements they were to discover later.

Directly in front of the police as they packed into the foyer stood Garrison, bedroom on his left, living room on his right, not a closed door in sight.[3]

Nothing about Garrison's presence or demeanor suggested that he was a neighbor rather than a housemate of McWebb's. When asked who he was he gave his name and followed police instructions to step into the living room (M2. 165). Neither he nor McWebb indicated there were two apartments.[4] Garrison was dressed only in pajamas and a very cumbersome body cast that he wore because of recent spinal surgery (M2. 104). For all the police knew or had reason to believe as they moved to "secure" the apartment (M2.

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[3] Detective Marcus recorded on the warrant return that the front door was opened by Garrison (J.A. 10)

[4] The trial court so found as a fact despite conflicting testimony. (J.A. 44) We do not argue that subjects of a search have an obligation to speak on pain that their silence will be construed against their interest. But we suggest that the reasonableness of police conduct here cannot properly be assessed without considering the absence of any protest whatever from McWebb and Garrison, the only two present who knew what the police did not. Their silence is part of the story.

24, 74, 87), Garrison was simply someone who shared McWebb's apartment or perhaps a friend who was staying there during his convalescence.

The visible presence of marijuana on Garrison's dresser, while no justification in and of itself for entry into Garrison's bedroom, nonetheless further enhances the reasonableness of their conduct. The informant, after all, had told of buying marijuana in McWebb's third floor apartment. That is where the police believed they were. And they saw the marijuana about five and a half feet away. (M2. 46)

Perhaps a pause for further reflection as they entered the front door would have led them to proceed with extra caution. But police executing a search warrant for narcotics, while required to adhere strictly to legal and constitutional obligations, are not expected to be hesitant. As this Court has said "[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden

violence or frantic efforts to conceal or destroy evidence." Michigan v. Summers, 452 U.S. at 702.[5]

Petitioner concedes that, as the trial court found, the warrant "specified the premises to be searched as the third floor apartment of the defendant McWebb". We concede also that the police mistakenly searched Garrison's apartment as well. We do not say that the search of Garrison's apartment was justified just because the two men treated the two apartments as one, but we do say that their living arrangement confirmed the reasonable presupposition of the police that there was only one apartment. We respectfully suggest that the trial court was correct in concluding,

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[5] There were other indications that McWebb and Garrison were sharing one apartment. A phone call for "Red Cross", McWebb's street name, was received on the phone in Garrison's bedroom, although the testimony does not make clear at what point during the search the call arrived. Clothes were hung on a hanger on the outside of the door to Garrison's apartment, something one would not normally expect to find on the outside of an apartment's exterior door. Those clothes also initially obscured from view an unused deadbolt on the door. Its later discovery was one of the factors that led the police to stop the search (J.A. 32).

as the Court of Special Appeals put it, that "... the police could not reasonably have discovered, prior to the time that the search was conducted and the contraband was observed and seized, that the third floor contained two separate apartments...." (APC 26).

The mistakes made by the officers in this case were those of "reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States, 338 U.S. 160, 176 (1949). Here, as in Hill, the officers' mistake was understandable because "sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment". 401 U.S. at 804. As Maryland's Court of Special Appeals put it, "one may require the police to be observant and to act reasonably; clairvoyance, however, is not required." (APC 18)

"Good Faith"

We do not argue, as Respondent suggests we do, that this case calls for an expansion of the good faith

exception to the exclusionary rule announced by this Court in United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and Massachusetts v. Sheppard, ___ U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). On the contrary, we believe that since there is no Fourth Amendment violation, there is no reason to apply the exclusionary rule or to invoke the good faith exception to it.

The good faith exception to the exclusionary rule assumes a violation of the Fourth Amendment, but excuses it because the police officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. The rule had its genesis in cases in which police officers, in "good faith", drew erroneous conclusions as to the existence of probable cause or relied on a warrant issued by a judicial officer without legal justification or that was deficient in some necessary but "technical" particulars, Leon; Sheppard; United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980), cert. denied, 449 U.S.

1127 (1981). It has operated most clearly in cases where a "mistake of law" that constitutes a Fourth Amendment violation is pardonable because of the officer's objectively reasonable "good faith". In such circumstances, two separate inquiries, one to determine if there was a Fourth Amendment violation and the other to determine whether it was excusable, are necessary. See, e.g., State v. Brown, 708 S.W.2d 140, 145 (Mo. banc 1986) (assumption that warrant issued without verified application in proper form); State v. Sweeney, 701 S.W.2d 420 (Mo. banc 1985) (anticipatory search warrant, assumed to be invalid under Missouri law); State v. Wilmoth, 490 N.E.2d 1236, 1244 (Ohio 1986) (error in wording of oath); United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984) (prospective search warrant); McCary v. Commonwealth, 321 S.E.2d 637 (Va. 1984) (error in written affidavit, corrected orally under oath before magistrate, search valid under Leon even if warrant somehow invalid); United States v. Asselin, 775 F.2d

445 (1st Cir. 1985) (search of disabled car undertaken in good faith belief that it was included within "premises" to be searched under warrant).

But where, as here, the police mistake is purely factual, the issues of whether there was a Fourth Amendment violation and whether the police acted in good faith are one and the same. The two questions merge. The objective reasonableness of the factual perception of the police is at the core of both inquiries.

Traditional Fourth Amendment probable cause standards already allow for reasonable, albeit mistaken, factual determinations. To state the classic definition from Carroll v. United States, 267 U.S. 132, 162 (1925), probable cause exists if "the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that [evidence of crime will be found in the place to be searched.]"

Professor LaFave points out "that in situations when an officer, acting upon a correct perception of the governing legal principles, makes a mistaken judgment as to the relevant facts ... there is no need to tamper with the exclusionary rule ...." W. LaFave, 1 Search and Seizure, §1.2 (1978, 1986 Supp. at 8). As Chief Justice Erickson of the Colorado Supreme Court recently said, "[A] 'reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause' . . . simply restates the existing standard for probable cause." People v. Deitchman, 695 P.2d 1146, 1150 n.6 (Colo. 1985) (concurring op.).

Indeed, every time a court stresses that the validity of a search or seizure turns on "reasonable appearances" facing the police at the time of the questioned conduct, it is acknowledging that the facts may turn out to be otherwise. See, e.g. cases cited in W. LaFave, 1 Search and Seizure, §1.2 (1978, 1986 Supp. at 8 and 38 n.71.27 and 71.28), especially United

States v. Rubin, 474 F.2d 262 (3d Cir. 1973), cert. denied, 414 U.S. 833 (1973) (emergency, reasonable belief that contraband will be destroyed or removed before warrant secured); People v. Mitchell, 347 N.E.2d 607 (N.Y. 1976), cert. denied, 426 U.S. 953 (1976) (emergency search for missing person); People v. Henderson, 210 N.E.2d 483 (Ill. 1965) (reasonable conclusion that defendant consented to search); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 424 U.S. 925 (1976) (authority of mother to consent to search of son's room). Other examples are the mistaken conclusion that the defendant was driving a stolen car, State v. Conaway, 319 N.W.2d 35, 41 (Minn. 1982) (probable cause for defendant's arrest existed despite car dealer's mistake in reporting license number to police and failure of police record to reflect recovery of stolen car); the mistaken search for a shooting victim who was already on the way to the hospital in People v. Soldoff, 169 Cal.Rptr. 57 (Cal.App. 1980) (officer conducting warrantless search

did not receive information that victim was already on route to hospital until after search revealed evidence); and the warrant to search for a weapon in the hands of an ex-felon in United States v. Hole, 564 F.2d 298 (9th Cir. 1977) (affiant reasonably relied on incomplete and misleading information from California Department of Justice regarding Hole's prior criminal record).

The notion of objectively reasonable police good faith has traditionally helped to resolve these cases of factual misperception. The clearest example is, of course, Hill v. California, 401 U.S. at 803-04, where the Court said:

> "[T]he officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." (Emphasis added).

While this Court correctly observed in Leon that, "As yet, we have not recognized any form of good faith exception to the Fourth Amendment exclusionary rule," __ U.S. at __, 104 S.Ct. at 3416, 82 L.Ed.2d at 692, it had more than a decade earlier adopted, in effect, an objectively reasonable good faith test by which to measure police mistake of fact in Fourth Amendment cases. In factual misperception cases, this Court recognized "good faith" as a useful tool of analysis long before it acquired the dignity of doctrine. We suggest that cases such as this fall squarely within the category contemplated by this Court when it said in Leon: "Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue." __ U.S. at __, 104 S.Ct. at 3423, 82 L.Ed.2d at 700.

We urge the Court to decide this case on Fourth Amendment grounds and to say that in cases such as this the merits of the Fourth Amendment claim and

the good faith inquiry are the same. As we argued in our original brief (Brief for Petitioner at 13-16), it is important to identify constitutional parameters in order to give the police clear guidance on permissible behavior and to assure that damage actions are properly resolved. It is also important because many states may not adopt good faith exceptions to their own exclusionary rules,[6] but may well continue to follow this Court in defining constitutional violations under their own parallel constitutional provisions. For those states in particular, it will be essential to know that the type of mistake here is constitutionally allowable.

Of course, if the Court should perceive a distinction in mistake of fact cases between the issue of Fourth Amendment compliance and the good faith inquiry and hold here that the mistake made the search

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[6] E.g., People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); State v. Novembrino, 491 A.2d 37 (N.J. Super. 1985), cert. granted, 101 N.J. 305, 501 A.2d 962 (1985).

unconstitutional, we naturally urge the Court to conclude that the police acted with the objectively reasonable good faith sanctioned in Leon and Sheppard. But, as we have tried to argue, we believe the two inquiries are the same.

CONCLUSION

For the reasons advanced herein, as well as those stated in our original brief, Petitioner requests that the judgment of the Court of Appeals of Maryland be reversed.

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